To question (b):

Grant No. 194 for Holding No. 255 did not create an estate in fee simple.

The appeal is allowed with costs here and in the court below. The deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Lee Kok Liang & Co.*

TENGKU MOHAMED ZAIRUDDEEN BIN TENGKU MOHAMED ZAID v. WAZURAIYAH BTE MOHAMAD

WAZURAIYAH BTE MOHAMED v. MEGAT NAJMUDDIN & ORS.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) September 18, 1985 & August 17, 1987]

[Kuala Lumpur – Federal Court Civil Appeal No. 145 of 1984 and Supreme Court Civil Appeal No. 167 of 1985]

Land Law – Caveat – Application to remove private caveat – Application made by person not caveatee – Onus on person to show sufficient grounds for treating him as a person claiming such an interest as would make him aggrieved by the existence of the caveat – Malay Reservation land – Transfer in breach of the Malay Reservation Enactment – National Land Code, s.327.

Land Law – Malay Reservation land – Attempt to transfer land to a non-Malay and non-native of Kelantan – Land sold to a company – Land transferred to a person as trustee for company – Attempt at dealing contrary to Enactment – Kelantan Malay Reservations Enactment, 1930, ss. 7, 12 & 13A – Kelantan Land Enactment, s.104.

In Civil Appeal No. 145 of 1984 the respondent, Wazuraiyah, had applied to remove a private caveat imposed on a piece of land in Kelantan by the appellant. Tengku Zaid, the registered owner of the land, had agreed to sell the land to Zaid Holdings Sdn. Bhd. for $165,000. He had appointed one Rosnani as his attorney to execute the sale of the land. The purchase price had been paid in full. The respondent was appointed as trustee by Zaid Holdings Sdn. Bhd. to hold the land. It was a condition of the sale that Zaid Holdings was to settle all Tengku Zaid's personal loans with two private companies, which was subsequently done. Rosnani, acting under the power of attorney, transferred the land to Wazuraiyah. Tengku Zaid sent a notification of the disposal of the land to the Director-General of Income Tax under the Real Property Gains Tax Act, 1976. Subsequently Tengku Zaid died and his son the appellant lodged a caveat against the land. The transfer of the land to Wazuraiyah could not be completed because of the caveat. The learned trial judge found that the transfer was properly executed and that the appellant's allegations of fraud were not substantiated. He held that the appellant as caveator had failed to satisfy the court that the caveat should remain and he therefore ordered the caveat to be removed. The appellant appealed.

In Civil Appeal No. 167 of 1985 the appellant, Wazuraiyah, had applied to remove the private caveat registered in respect of the same land and entered by the respondents. Zaid Holdings had passed a resolution approving the purchase of the land from Tengku Zaid and substituting itself for Tengku Zaid in a joint venture agreement between Tengku Zaid and Gunung Petaling. The land had been transferred to the appellant. The learned trial judge held that the appellant had not raised sufficient grounds for treating her as a person claiming an interest in the land as would, if established, make her aggrieved by the existence of the caveat. He also held that the respondents had succeeded in satisfying the court that they had an interest in the property which raised a serious question to be tried and that on the balance of convenience it would be better to maintain the *status quo* until the completion of the trial. The appellant appealed.

Held: (1) the question in Civil Appeal No. 145 of 1984 is whether the respondent, Wazuraiyah, has satisfied the court that there are sufficient grounds in fact and in law for treating her as a person claiming such an interest in the land as would make her aggrieved by the existence of the caveat;

(2) the caveated land is Malay Reservation land and in the absence of evidence, it must be assumed that Zaid Holdings had abandoned the attempt to be included as a company in Schedule D of the Kelantan Land Enactment or had failed to obtain such approval. In either event the fact of the respondent, as trustee for Zaid Holdings, being made registered owner of the land could clearly be in contravention of section 12 of the Kelantan Malay Reservations Enactment, 1930, and therefore null and void;

(3) in the result the respondent has failed to show that she is a person aggrieved under section 327 of the National Land Code and the caveat should remain. The appeal in Civil Appeal No. 145 of 1984 is therefore allowed;

(4) the issue in Civil Appeal No. 667 of 1985 is whether the appellant, Wazuraiyah, is a person aggrieved. In this case the transfer of the land to the appellant as trustee for Zaid Holdings was in breach of the Malay Reservations Enactment and her appointment as trustee was an attempt at a dealing contrary to section 12 of the Enactment and therefore null and void. The appeal must therefore be dismissed.

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212.

(2) *Registrar of Titles, Johore* v. *Temenggong Securities Ltd.* [1976] 2 M.L.J. 44.

(3) *Foo Say Lee* v. *Ooi Heng Wai* [1969] 1 M.L.J. 47.

(4) *Lee Ah Thaw & Anor.* v. *Lee Chun Tek* [1978] 1 M.L.J. 173.

SUPREME COURT.

Zainun bin Zakaria for appellant in C.A. 145/84.

G. Sri Ram for respondent in C.A. 145/84 and for appellant in C.A. 167/85.

Wong Swee Min for respondent in C.A. 167/85.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court): In Civil Appeal No. 145 of 1984 the respondent who was the plaintiff in the court below, Wazuraiyah Bte. Mohamad (hereinafter referred to as Wazuraiyah), had applied to remove a private caveat imposed on land under Geran No. 10588 Lot 763 Mukim of Tanjong Chat, Kelantan by one Tengku Mohamed Zairuddeen bin Tengku Md. Zaid (hereinafter referred to as Zairuddeen).

Tengku Zaid Ahmad who died on May 11, 1983, agreed to sell the caveated land to Zaid Holdings Sdn. Bhd. for $165,000. On March 23, 1983, Tengku Zaid executed a Power of Attorney appointing as his attorney one Cik Rosnani binti Abdul Hamid empowering her, among other things, to execute the sale of the land on his behalf. The purchase price was paid to Tengku Zaid in full on March 28, 1983. Wazuraiyah was appointed on March 29, 1983, as trustee by Zaid Holdings Sdn. Bhd. to hold the land earlier mentioned, then owned by Tengku Zaid. It was a condition of the sale that Zaid Holdings was to settle all Tengku Zaid's outstanding personal loans with Kumpulan Kesuma Sdn. Bhd. (Kesuma) and Kumpulan Travel Sdn. Bhd. (Travel). Both Kesuma and Travel by their letters dated March 30, 1983, confirmed that full settlement of all outstanding debts of Tengku Zaid with these two firms had been effected. Acting under her Power of Attorney Cik Rosnani on May 7, 1983, signed a transfer form in the appropriate form, transferring the land to Wazuraiyah. The signatures of both Cik Rosnani and Wazuraiyah on the form were attested by a Collector of Land Revenue. After the sale of the land Tengku Zaid, on April 1, 1983, wrote a letter to the Director-General of Income Tax, submitting a notification of disposal of chargeable assets required under the Real Property Gains Tax Act 1976. Then on May 11, 1983, Tengku Zaid died. Because of the caveat lodged by Zairuddeen the transfer of the land to Wazuraiyah could not be completed.

To support his application for lodgment of the caveat Zairuddeen had disclosed in his statutory declaration dated November 11, 1983, that he was a natural son of Tengku Zaid and that he was in the course of filing for Letters of Administration of his late father's estate, and that the purpose of the caveat was to protect the interest of the beneficiaries.

In his affidavit in reply to Wazuraiyah's affidavit, Zairuddeen also stated that he was a prospective co-administrator of the estate. He also alleged that his deceased father's letter to Zaid Holdings dated March 18, 1983, concerning the sale and purchase of the land bore a forged signature of the deceased. He also alleged that the deceased's signature on the Power of Attorney dated March 28, 1983, was false since the deceased had on that day gone to Singapore. It was also alleged by him that the sale was void being contrary to the provisions of the Malay Reservations Enactment Kelantan, 1930.

The learned trial Judge examined the documents attached to Wazuraiyah's affidavit, and regarding the allegation of the respondent noted that the Power of Attorney was executed by the deceased on March 28, 1983 in the presence of Tan Meng Chin, an Advocate and Solicitor.

As regards the sale of land, the transaction entered into, he remarked, was supported by the deceased's letter to the Director-General of Income Tax of April 1, 1983, and as regards the full payment of the purchase price to the deceased, a receipt attached to the affidavit and signed by the deceased he regarded as ample proof. Regarding the settlement of deceased's debt to Kesuma and Travel, two letters dated March 30, 1983, issued by the two companies, he said, were sufficient proof.

He therefore found that the sale was complete and the transfer properly executed. The Judge then held that in the face of the evidence of Wazuraiyah, Zairuddeen's allegation of fraud was not substantiated.

As to the allegation by Zairuddeen that the sale was contrary to the provisions of the Kelantan Malay Reservations Enactment, the Judge added that there was nothing to prevent him from bringing an action against Wazuraiyah or any one he chooses under section 12(i) of that Enactment to declare the sale null and void, but that Zairuddeen would first have to file for Letters of Administration of his father's estate which he had not done.

Referring to the Privy Council decision in *Eng Mee Yong & Ors.* v. *V. Letchumanan,*[1] the trial Judge appears to be under the impression that as a general proposition the caveator would have to satisfy the court that the caveat should remain. For reasons set out by him he was satisfied that the caveator had failed to do so, found in favour of Wazuraiyah and therefore ordered that the caveat entered by Zairuddeen should be removed.

In Civil Appeal No. 167 of 1985 Wazuraiyah, the respondent in C.A. No. 145/84, appealed against the decision of Abdul Malek J. who had dismissed her application to remove Private Caveat Presentation No. 206 of 1983 (the Caveat) which was registered on June 29, 1983 and entered by the four respondents in this appeal over the same piece of land as the one referred to in C.A. No. 145/84.

The basis of her application, briefly, is as follows:

(a) On 17.3.83 Zaid Holdings (hereinafter "ZH") passed a Directors' resolution approving the purchase of the said land for $165,000 and substituting itself for Tengku Zaid bin Tengku Ahmad (hereinafter "Zaid") in the joint venture agreement between Gunung Petaling (hereinafter "GP") and Zaid with regard to the said land;

(b) On 18.3.83 the registered proprietor of the land, Zaid, agreed to sell the land to ZH for $165,000 subject to certain terms and conditions mentioned in a letter of the same date;

(c) On 23.3.83 ZH resolved that Zaid should give a Power of Attorney to one Rosnani Abdul Hamid in regard to all matters pertaining to the said land;

(d) On 28.3.83 Zaid issued the acknowledgment and receipt for the payment of $165,000 for the said land;

(e) On 29.3.83 ZH appointed the appellant as trustee in respect of the land;

(f) On 7.5.83 Zaid executed a transfer form under the National Land Code in respect of the said land in favour of Wazuraiyah (appellant);

(g) On 11.5.83 Zaid passed away;

(h) On 29.6.83 a caveat was entered by the respondents on the said land;

(i) On 1.12.83 the appellant's solicitors wrote to the respondents requiring them to remove the caveat.

After considering the affidavits filed by both sides and arguments raised by counsel, the learned trial Judge dismissed the application. His reasons are briefly as follows:

Following *Eng Mee Yong & Ors.* v. *V. Letchumanan,* page 212, where the applicant is someone other than the caveatee he has no registered title to rely upon as *prima facie* evidence of his interest in the land and it is for him to begin by satisfying the court that there are sufficient grounds in fact and in law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat. The learned trial Judge found that the appellant had not raised sufficient grounds to satisfy him on that score.

Having *Eng Mee Yong's* case in mind, his Lordship found that the respondents had succeeded in satisfying the court that they had an interest in the property which raised a serious question to be tried and that on the balance of convenience it would be better to maintain the *status quo* until the completion of the trial.

He noted that the appellant claimed to be a trustee for ZH but also observed on an examination of the Trust Deed (WM-3) that the trust was to become effective only if the application for transfer from Zaid to ZH is not approved by the Kelantan Land Authorities. There being nothing in the affidavit to show that such an application had ever been made, he held that the trust had not taken effect. He also noted that the purported sale and purchase of the land from Zaid to ZH on March 18, 1983, was also, quite apart from the ambiguous purchase price arising from the second condition that ZH was to settle all of Zaid's outstanding personal loans with Kumpulan Kesuma Sdn. Bhd. and Kumpulan Travel Sdn. Bhd., in contravention of the provisions of sections 7 and 12 of the Kelantan Malay Reservations Enactment 1930 and section 104 of the Kelantan Land Enactment 1938. Remarking that the effect of the relevant provisions of these two Enactments is that only a person who is a Malay native of Kelantan can purchase the land, he could find nothing in the affidavit to show that the appellant came within

this category and, in any case, ZH could also not bring itself within that category, as its directors frankly admitted in their resolution, Exhibit WM1A. Only the approval of the Ruler-in-Council, he added, could save this transaction, but the agreement had not specifically stated that it would be conditional upon such approval.

He therefore held that the agreement was on the face of it null and void, the consideration irrecoverable and no action would lie for breach of the agreement.

He also ruled that the agreement between Zaid and ZH cannot be said to be complete because there was no evidence that the amount to be paid by the two companies mentioned therein had in fact been paid. The learned Judge also found that after the so-called sale and purchase transaction on March 18, 1983 Zaid sent letters to Gunung Petaling (GP) on April 20, 1983, witnessed by his attorney, assigning two million ringgit of his interest to Kumpulan Holdings Sdn. Bhd. If there had in fact been a sale and purchase, he wondered why Zaid had also assigned his interest under the joint venture agreement with GP after the purported sale. He also noted that by virtue of the joint venture agreement with GP, Zaid had in fact deposited the land title with GP's solicitors and had agreed not to deal with the land. The sale and purchase agreement on March 18, 1983, and the assignment of his interest on April 20, 1983, and the circumstances which made that sale and purchase agreement null and void, he held as evidence of the fraudulent intention of Zaid not to honour his part of the joint venture agreement with GP.

Citing the decision in *Registrar of Titles, Johore* v. *Temenggong Securities Ltd.*[2] as authority for the proposition that the purpose of a private caveat is to preserve the *status quo* pending the taking of steps by the caveator to enforce his interest in the land by court proceedings, he noted that the respondents had already filed an action for specific performance of the joint venture agreement (Kota Bahru Originating Summons No. 278/84), against either ZH or the administrators of Zaid's estate.

Finding therefore that the respondents have a caveatable interest in the joint venture agreement, he dismissed Wazuraiyah's application.

On behalf of the appellant in C.A. 145 of 1984, Zainur pointed out that it is common ground that the caveated land is Malay Reservation Land. The respondent, he added, had applied under section 327 of the National Land Code to remove the caveat.

The learned trial judge had in his judgment remarked that it is for the appellant caveator to satisfy the court that the caveat should remain, citing as authority the Privy Council decision in *Eng Mee Yong & Ors.* v. *V. Letchumanan.* Zainur's contention, (we agree with him), is that the respondent, Wazuraiyah, is not the caveatee, not being the registered proprietor of the land. The relevant passage in the latter judgment (at page 215) reads:

> "It is otherwise when the applicant under s.327 is some one other than the caveatee ... It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat."

Wazuraiyah's appointment as trustee for Zaid Holdings is conditional on refusal of the Kelantan Land Authority to approve the transfer from Tengku Zaid to Zaid Holdings Sdn. Bhd.

Would that make Wazuraiyah an aggrieved person?

Encik Sri Ram's (for respondent) reply is that ZH never signed the agreement but merely undertook to enter into an agreement by paying a deposit the day after the resolution by ZH was passed on March 17, 1983 (and further consequential resolutions followed on March 23, 1983 and March 29, 1983 – pages 14 & 15 respectively). Therefore it was a conditional agreement and therefore cannot, despite Zainur's contention, be void. The latter had advanced the argument that section 7(1) of the Kelantan Land Enactment had the effect of making that agreement void *ab initio.* Section 7(1) reads:

> "No right or interest of any Malay in reservation land and no right or interest in such land acquired by virtue of s.13A by any person not being a Malay shall be transferred to or transmitted to or vest in any person not being a Malay ... save as provided in the Enactment."

It is the sort of agreement says Mr. Sri Ram which comes within the ambit of the Federal Court decision, in *Foo Say Lee* v. *Ooi Heng Wai.*[3]

There, the plaintiff had entered into an agreement with the defendant for the purchase of land in Kota Bahru which was Malay Reserve Land. A condition of the agreement provided that the sale was subject to the approval of the Kelantan govern-

ment and His Highness the Ruler-in-Council (under section 13A of the Enactment). It was held that such an agreement was not null and void.

Turning now to the matter under appeal, we note that on March 17, 1983 (see page 11 of record) ZH passed a resolution to purchase the land from Zaid, that respondent Wazuraiyah be appointed as trustee to hold the property in trust for ZH as ZH cannot hold landed property in Kelantan. It was finally resolved that ZH should apply to the relevant authorities to be gazetted as a Kelantan Bumiputra company, no doubt thereafter to be added to Schedule D of the Kelantan Land Enactment under section 9A(1) thereof.

Five days later (on March 23, 1983) ZH passed another resolution whereby Zaid gave a Power of Attorney to Cik Rosnani Abdul Hamid to execute all relevant and transfer documents, and on March 29, 1983 yet another resolution was passed authorising her to execute a transfer to ZH, with the further resolution that if there is no approval by the Kelantan Land Authorities so to do, to transfer the land instead to Wazuraiyah who was to hold the land as trustee for ZH. At pages 16 to 18 of the record is a copy of the transfer to Wazuraiyah dated May 7, 1983, ostensibly in her personal capacity.

This transfer was not registrable, he added, because of the caveat.

It is not in dispute that Wazuraiyah is a Kelantan Malay. In those cases cited for the appellants, Sri Ram argues, one of the parties was not a Kelantan Malay.

However there is, as Zainur says, no running away from the fact that Wazuraiyah came into the picture solely because of the various resolutions passed by ZH which we have alluded to earlier. Zainur argues that the facts in the instant appeal are not covered by the principle in *Foo Say Lee*. There the agreement was conditional upon the Ruler-in-Council's approval under section 13A of the Enactment. In the instant appeal, the trustee Wazuraiyah was appointed to receive the transfer pending the approval of ZH's application to be gazetted as a Kelantan Bumiputra company under section 13A. Whilst the later resolutions on March 23, 1983, and March 29, 1983, contemplated appointment of Wazuraiyah as trustee only in the event of failure to obtain such approval, the transfer at pages 16/18 of the records on May 7, 1983, was a transfer to her, ostensibly in her personal capacity. Whilst what preceded this later step would be evidence that she received the transfer as trustee of ZH, would such fact not be in contravention of section 12 of the Enactment and therefore make the dealing and disposal null and void?

It may well be that if the issue is whether the appellant himself has a caveatable interest, he might not as beneficiary of a residuary title have claim to such, following *Lee Ah Thaw & Anor.* v. *Lee Chun Tek*,[4] but that is not the question we seek to answer. The question which arises is whether as we have said earlier, the respondent Wazuraiyah has satisfied us "that there are sufficient grounds in fact and in law for treating her as a person claiming such an interest in the land as would make her aggrieved by the existence of the caveat," to paraphrase Lord Diplock's remarks in *Eng Mee Yong's* case.

We can only assume that ZH had either abandoned the attempt to be included as a company in Schedule D of the Enactment on an application being duly made under section 13A thereof, or had failed to obtain such approval. In either event, no evidence having been made available one way or other, the fact of Wazuraiyah, as trustee for ZH, being made registered owner of the land would clearly be in contravention of section 12 of the Enactment and therefore null and void. In the result Wazuraiyah has failed to show that she is a person aggrieved under section 327 N.L.C. and the caveat should remain.

Accordingly we would allow the appeal in C.A. No. 145 of 1984 with costs here and below. Deposit to be refunded to appellant.

Coming now to C.A. No. 167 of 1985 where the learned trial Judge held that the applicant Wazuraiyah had no *locus standi* under section 327 of the National Land Code, Mr Sri Ram adopted the arguments previously advanced by him on *locus standi* in C.A. No. 145 of 1984. In addition he had one further argument. We were referred to page 14 of the records in C.A. No. 167 of 1985. This is the directors' resolution dated March 17, 1983 wherein, to summarise: (1) ZH resolved that the company should purchase the land, (2) ZH is to be substituted in place of Zaid in the joint-venture agreement between Zaid and GP regarding the said property, (3) a trustee be appointed to hold the property in trust for ZH which cannot hold landed property in Kelantan and (4) ZH is to apply to the relevant State authority in

Kelantan to be gazetted as a Kelantan Bumiputra company.

The joint-venture agreement dated January 5, 1982, was made conditional upon approval of the Ruler-in-Council of the sale from Zaid to any person or body not being a Malay but who is a native of Kelantan with a clause for GP to determine the agreement if such approval is not obtained within 15 months from January 5, 1982, the date of it being signed. Presumably the Ruler-in-Council's approval was *not* sought to obtain such approval under section 13A of the Enactment.

Mr. Sri Ram adds that since the condition precedent *i.e.* such approval was not obtained within 15 months, the agreement was no longer valid. The assignment on May 9, 1983 to the respondent was after the lapse of the agreement. However, there was no evidence of the termination by GP of the agreement in accordance with the provision mentioned earlier. Mr. Sri Ram argues that a conditional agreement cannot be enforced until the condition precedent has occurred. On page 22 of the Supplementary Records in C.A. No. 167 of 1985 the learned trial judge referred to a suit filed by GP against ZH or the personal representatives of Zaid for specific performance of the joint-venture agreement. He also referred to pages 76 and 77 of the records where ZH had acted on the assumption that the agreement was still valid and so wrote the letters thereat to GP, and Mr. Sri Ram having taken over from the previous solicitors also acted on same assumption in writing the letters at pages 62/63 dated September 1, 1983.

We are inclined however to agree with Mr. Wong (for the respondent) that the only issue still is whether Wazuraiyah is a person aggrieved. One should remember that this is an application under section 327 of the National Land Code, and just as we have held in C.A. No. 145 of 1984, the principle enunciated in *Eng Mee Yong & Ors.* v. *V. Letchumanan* applies, namely, not being a caveatee since she is not the registered proprietor of the land it is for her to satisfy us that there are sufficient grounds in fact and law for treating her as a person claiming such an interest in the land as would, if it were established, make her aggrieved by the existence of the caveat. Though Mr. Wong is incorrect in thinking that the argument as to whether the respondent as a caveator must first satisfy the Court that on the evidence his claim to an interest in the property does raise a serious question to be tried, *etc.* was never raised in the Court below, it seems to us that the question was indeed raised – (see page 23 of the Supplementary record) – for the learned trial Judge considered this matter and held that the respondent had in fact succeeded in so proving. The need for the respondent so to prove is not necessary in the present case. That point was considered because the trial judge had misapprehended the purport of Lord Diplock's judgment in the passage preceding the one we have cited from *Eng Mee Yong's* case.

We agree with Mr. Wong however that the condition precedent for the appointment of Wazuraiyah as trustee had not come to pass, *i.e.* that there was no refusal by the Kelantan Land Authority to allow the transfer to ZH. In any case even if she had been properly appointed, the trust is indeed for an illegal purpose. There had been no sale and purchase agreement in the real sense, only a series of company resolutions, those we have referred to earlier. Her appointment would in any event indeed be an attempt at a dealing contrary to section 12 of the Enactment and therefore null and void.

What interest indeed could Wazuraiyah acquire which would make her aggrieved by the existence of the caveat under the void agreement? We would hold that she would acquire none and would therefore dismiss the appeal with costs here and below. Deposit to respondent on account of taxed costs.

Appeal in C.A. No. 145/84 allowed.
Appeal in C.A. No. 167/85 dismissed.

Solicitors: *Zainur & Maydien; Sri Ram, Zulkifly & Kumar; Megat Najmuddin Leong & Co.*